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DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket No.: 130712613-3613-01]

Notice of Limited, Program-Wide, Public Interest Waivers of Section 1605(a) (Buy American Requirement) of the American Recovery and Reinvestment Act of 2009

AGENCY: National Institute of Standards and Technology, U.S. Department of Commerce (Commerce).

ACTION: Notice.

SUMMARY: The National Institute of Standards and Technology (NIST) is hereby providing notice of two, program-wide, limited public interest waivers of the Buy American requirements set forth in the American Recovery and Reinvestment Act of 2009 (ARRA). The two limited, program-wide, public interest waivers set forth in this Notice apply to projects constructed by recipients receiving financial assistance awards (grants) pursuant to the NIST ARRA Construction Grant Program to which the ARRA Buy American requirements apply.

The first limited, program-wide, public interest waiver applies to a grant recipient's use of a de minimis amount of non-domestic iron, steel or manufactured goods that, in the aggregate, comprises no more than five percent of the total cost of the iron, steel and manufactured goods used in a grant

recipient's ARRA construction project. The second limited, program-wide, public interest waiver applies to a grant recipient's use of non-domestic manufactured goods where such non-domestic goods are necessary for the integration and operation of the recipient's construction project into the recipient's existing safety and security systems. Both program-wide, public interest waivers of the Buy American requirements apply over the entire award period of the grant projects. The two, limited, public interest Buy American waivers set forth in this Notice do not apply to procurement contracts issued pursuant to the NIST ARRA Construction of Research Facilities program.

DATES: The limited, public interest, ARRA Buy American waivers set forth in this Notice are effective upon publication and apply to certain iron, steel and manufactured goods used by recipients, at any time during an award's authorized construction period, in projects receiving financial assistance awards under the NIST ARRA Construction Grant Program.

FOR FURTHER INFORMATION CONTACT: Michael Diestel, P.E., Federal Program Officer, NIST Construction Grants Program Office, Office of Facilities and Property Management (OFPM), National Institute of Standards and Technology, 100 Bureau Drive, Mailstop 1900, Gaithersburg, Maryland 20899; email: michael.diestel@nist.gov.

SUPPLEMENTARY INFORMATION:

Section 1605(a) of the ARRA (Pub. L. 111-5) prohibits the use of ARRA funds for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States (Buy American requirements), or unless the head of a Federal department or agency grants a waiver to the Buy American requirements. ARRA Section 1605(b)(1) provides that the Buy American requirements shall not apply in any case or category in which the head of a Federal department or

agency finds that applying the Buy American requirements would be inconsistent with the public interest. ARRA Section 1605(c) provides that if the head of a Federal department or agency makes a determination under ARRA Section 1605(b), the head of the department or agency shall publish a detailed written justification in the **Federal Register**.

On November 23, 2010, the Secretary of Commerce delegated authority to the Under Secretary of Commerce for Standards and Technology and Director, National Institute of Standards and Technology (NIST Director) to make case-by-case inapplicability (waiver) determinations under ARRA Section 1605 for construction projects funded pursuant to the NIST ARRA Construction Grant Program. On September 10, 2013, the Secretary of Commerce amended the aforementioned November 23, 2010 delegation of authority to authorize the NIST Director to make limited, program-wide, public interest waiver determinations under ARRA Section 1605 for construction projects funded pursuant to the NIST ARRA Construction Grant Program.

In accordance with ARRA Section 1605 and pursuant to the aforementioned amended delegation of authority to the NIST Director, the NIST Director is issuing the following two, limited, program-wide, public interest waivers of the Buy American requirements applying to projects funded by the NIST ARRA Construction Grant Program:

(1) A grant recipient's use of a de minimis amount of non-domestic iron, steel or manufactured goods that, in the aggregate, comprises no more than five percent of the total cost of the iron, steel and manufactured goods used in a grant recipient's ARRA construction project (De Minimis Waiver); and

(2) A grant recipient's use of non-domestic manufactured goods where such non-domestic goods are necessary for the integration and operation of the recipient's ARRA construction project into the recipient's existing safety and security systems (Safety and Security Systems Waiver). Both program-wide, public interest waivers of the Buy American requirements apply over the entire award period of the grant projects.

Background

Pursuant to appropriated funding made available under ARRA, NIST issued competitive grant awards in the total amount of approximately \$180 million to support the construction of 16 new research science facilities at 15 universities and 1 nonprofit research organization across the United States. The awarded construction projects support critical infrastructure for a diverse portfolio of cutting-edge scientific research ranging from offshore wind power, aquaculture, and marine ecology, to physics research and nanotechnology. Together with matching shares from the grant recipients, the 16 ARRA projects will result in more than \$400 million being invested in new laboratory construction projects.

Of the 16 recipients of NIST ARRA construction grants, the following 10 are subject to the ARRA Buy American requirements by virtue of their respective status as public universities and the respective status of their construction project as a public building or public work: Auburn University; Georgia Institute of Technology; Kansas University; Purdue University; University of Kentucky; University of Maine; University of Maryland at College Park; University of Nebraska at Lincoln; University of North Carolina at Wilmington; and University of Pittsburgh. The remaining 6 NIST ARRA construction grant awards are not subject to the ARRA Buy America requirements, which do not apply to construction projects owned by non-public organizations such as private institutions and non-profit entities: Columbia University; Georgetown University; NOVA Southeastern University; Rice University; University of Miami; and Woods Hole Oceanographic Institution.

De Minimis Waiver

The NIST Director is hereby issuing a limited, program-wide, waiver of the ARRA Buy American requirements set forth in ARRA Section 1605(a) based on his determination that, under ARRA Section 1605(b)(1), the application of the Buy American requirements would be inconsistent

with the public interest as applied to a de minimis amount of incidental items used in a grant recipient's construction project where such items, in the aggregate, comprise no more than five percent of the total cost of the iron, steel and manufactured goods used and incorporated into the project.

Large-scale and complex construction projects, such as those supported by the NIST ARRA Construction Grant Program, typically use thousands of miscellaneous, generally low-cost items that are essential for, but incidental to, the construction of public buildings or public works that are incorporated into the physical structure of the project. The miscellaneous character of these items, together with their low cost (both individually and when procured in bulk), further characterize them as incidental to the project. Examples of these incidental construction items include nuts, bolts, wires, cables, switches, etc. For many of these incidental items, the country of manufacture and the availability of domestic alternatives are not always readily or reasonably identifiable to the grant recipient, even after substantial research and due diligence.

Requiring NIST construction grant recipients to expend substantial resources to comply with Buy American requirements as they pertain to incidental construction components jeopardizes timely project completion by the recipients, as well as the public use of the much needed scientific research facilities and, therefore, is inconsistent with the public interest. Moreover, requiring grant recipients to request individual ARRA Buy American waivers for incidental components would be time prohibitive and overly burdensome for both grant recipients and NIST staff charged with the oversight of these projects. Accordingly, the NIST Director's issuance of the De Minimis waiver is justified in the public interest because it will help grant recipients (and their subrecipients and contractors) avoid unnecessary costs and delays in carrying out their respective ARRA construction projects; thereby, facilitating the timely completion and public use of the newly-constructed scientific research facilities.

Safety and Security Systems Waiver

The NIST is hereby issuing a limited, program-wide, waiver of the Director ARRA Buy American requirements set forth in ARRA Section 1605(a) based on his determination that, under ARRA Section 1605(b)(1), the application of the Buy American requirements would be inconsistent with the public interest as applied to a grant recipient's use of non-domestic manufactured goods where such non-domestic goods are necessary for the integration and operation of the recipient's ARRA construction project to the recipient's existing safety and security systems.

All of the construction projects awarded under the NIST ARRA Construction Grant Program are either additions to existing buildings or new facilities within a campus environment. Public universities and other grant recipients constructing these projects generally employ uniform safety and security features that are interoperable across the campus, such as integrated police, fire alarm and other emergency communication systems, security locks, access card readers, high-pressure steam valves, etc. These common and uniform safety and security systems tend to greatly enhance the proper functioning and availability of these systems as a whole; thereby, providing maximum protection to persons and property. Uniform systems are also generally more cost effective for recipients to install, monitor and maintain versus multiple or mismatched systems across a campus environment. Conversely, mismatched components are often incompatible and extremely difficult or impossible for the recipient to properly integrate into existing systems due to the differing technical specifications, fitments, and other interoperability concerns. As a result, mismatched components may not integrate into existing common security or building automation systems, or may be more prone to failure, as well as being costlier to maintain and repair than common systems. The potential for these mismatched systems to not properly integrate or communicate within an existing campus system could present imminent life safety concerns. Further, while system function and interoperability is of primary public interest concern, warranty is also a consideration in that certain manufacturers will not warranty their systems if non-specified components or components from a specific manufacturer are not used.

It is inconsistent with the public interest to increase safety risks to persons and casualty losses to property in order to comply with the ARRA Buy American requirements as they specifically apply to grant recipients' (and to their subrecipients' and contractors') use of non-domestic manufactured goods, where such non-domestic goods are necessary for the integration and operation of the recipient's ARRA construction project into the recipient's existing safety and security systems. Accordingly, NIST's issuance of the Safety and Security Systems Waiver is in the public interest because it will help ensure that the installation, maintenance, interoperability, and overall operation of safety and security systems incorporated into a grant recipient's construction project function properly and are otherwise compatible with the recipient's existing systems; thereby, providing maximum protection to persons and to property.

Recipient Compliance and NIST Monitoring

Recipients of NIST ARRA Construction Grant Program awards seeking to utilize the De Minimis Waiver and/or the Safety and Security Systems Waiver must determine with specificity the items to be covered by the waiver(s) and must retain complete and accurate records and supporting documentation, including the types and/or categories of items to which this waiver is applied and, for incidental construction items, the calculations by which the grant recipient determined its use of non-domestic iron, steel or manufactured goods used in the project equals five percent or less than the total cost of the iron, steel and manufactured goods used in the project. The recipient's records will be reviewed periodically by NIST as part of its ongoing project monitoring and oversight functions and, upon request, the records must be made available to the Department of Commerce Office of Inspector General for inspection.

This **SUPPLEMENTARY INFORMATION** constitutes the detailed written justification required by ARRA Section 1605(c) for waivers based on a public interest finding under ARRA Section 1605(b)(1). The waiver determinations set forth herein are being made pursuant to the delegation of

authority by the Secretary of Commerce to the NIST Director for projects funded under the NIST ARRA Construction Grant Program. The NIST Director reserves the right to revisit and amend the determinations set forth herein based on new developments or new information.

Authority: Section 1605 of the American Recovery and Reinvestment Act of 2009, Pub. L. 111–5, Section 1605.

Catalogue of Federal Domestic Assistance (CFDA): 11.618, National Institute of Standards and Technology Construction Grant Program

Dated: November 4, 2013.

Kevin Kimball
NIST Chief of Staff

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